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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

THE LONG ISLAND RAIL ROAD COMPANY,

Petitioner,

vs.

JOHN BATES, JAMES BUTLER, ANTONIO SALVA, MALACHY LYONS, JR., individually and on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondent Malachy Lyons, Jr., submits this brief in opposition to the petition by the Long Island Rail Road for a writ of certiorari to the United States Court of Appeals for the Second Circuit, which petition is brought on the grounds that (1) the

District Court lacked subject matter jurisdiction and (2) respondent Lyons is judicially estopped from maintaining his action under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

The petition should be denied, as petitioner has failed to present any "special and important reasons therefor."

POINT I

PETITIONER IS INCORRECT IN CLAIMING THAT THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION.

Petitioner argues that the District Court lacked subject matter jurisdiction because "respondents' Rehabilitation Act claims turn on the provisions of their respective collective bargaining agreements" and, as such, "constitute 'minor disputes' under the RLA" (Railway Labor Act), which "must be resolved through arbitration" (Pet.,

pp. 37-38).

Petitioner has pointed to no case that would warrant dismissal for lack of subject matter jurisdiction. In McDonald v. City of West Branch, 466 U.S. 284, 290 (1984), the Court unanimously held that, in an action brought pursuant to 42 U.S.C. §1983, res judicata or collateral estoppel effect should not be given to an award in an arbitration proceeding brought pursuant to the terms of a collective-bargaining agreement. The synopsis of the Court's holding states, in pertinent part, as follows (466 U.S. at 284):

> Although arbitration is well suited to resolving contractual disputes, it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that §1983 is designed to safeguard. As a result, according preclusive effect to an arbitration

> award in a subsequent §1983 action would undermine that statute's efficacy in protecting federal rights. This conclusion is supported by the facts that an arbitrator may not have the expertise to resolve the complex legal questions that arise in §1983 actions or the authority to enforce §1983; that a union's usual exclusive control over grievance procedures may result in the employee's loss of an opportunity to be compensated for a constitutional deprivation merely because it was not in the union's interest to press his grievance vigorously; and that arbitral factfinding is generally not equivalent to judicial factfinding.

See also, Alexander v. Gardner-Denver Co., 415 U.S. 36, 49-50 (1974); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 737 (1981).

The above-quoted language is equally applicable here, where petitioner seeks to deprive plaintiffs of a federal civil rights statute because of an arbitration brought under a collective bargaining agreement. It should be noted that the

Federal Employers' Liability Act, pertaining to common carriers by railroad (at 45 U.S.C. §58), provides that:

> Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress. [Emphasis added].

The mere fact that a Long Island Railroad union employee is subject to the Railway Labor Act's dispute resolution procedures does not preclude such employee from seeking redress under the United States Constitution or under federal statutes such as the Rehabilitation Act of 1973.

It is no answer to say that McDonald v. City of West Branch, supra, is not applicable here by virtue of the Court's subsequent decision in Gilmer v. Interstate-Johnson Lane Corp., ____ U.S. ____,

111 S.Ct. 1647 (1991). In Gilmer, the Court held that a claim under the Age Discrimination in Employment Act of 1956 "can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application" (____U.S. at ____, 111 S.Ct. at 1650); However, McDonald and Alexander v. Gardner-Denver Co. remain applicable for the reasons stated by the Court in Gilmer itself, which we cite at length (____U.S. at ____, 111 S.Ct. at 1657):

> There are several important distinctions between the Gardner-Denver line of cases and the case before us. First, those cases do not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were

> not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the FAA [Federal Arbitration Act], which, as discussed above, reflects a "liberal federal policy favoring arbitration agreements." Mitsubishi, 473 U.S., at 625, 105 S.Ct., at 3353. Therefore, those cases provide no basis for refusing to enforce Gilmer's agreement to arbitrate his ADEA claim.

See also, Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir., 1991), aff'd after remand, 975 F.2d 1161 (5th Cir. 1992), where the court wrote (939 F.2d at 230, fn.*):

> The FAA's coverage excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged

> in foreign or interstate commerce." 9 U.S.C. §1. In both this case and Gilmer, the arbitration clause was contained in the employee's contract with a securities exchange, not with the employer. See generally Gilmer, 111 S.Ct. at 1651 n. 1 (discussing the exclusionary clause of §1). Courts should be mindful of this potential issue in future cases.

This language further argues in favor of the application of the Gardner-Denver line of cases here to sustain the retention of subject matter jurisdiction.

POINT II

THE COURT OF APPEALS PROPERLY RULED ON THE ISSUE OF JUDICIAL ESTOPPEL.

While there is no universally accepted test for the application of the doctrine of judicial estoppel, or estoppel against inconsistent positions in litigation (Scott v. Land Span Motor, Inc., 781 F. Supp. 1115, 1119 [D.S.C. 1991]), an oft-cited definition appears in Davis v. Wakelee, 156 U.S. 680, 689 (1895), as follows:

> [W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position. [Emphasis added].

In Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis, 903 F.2d 109 (2d Cir. 1990), the court declared that "[t]he doctrine of judicial estoppel...applies only if the party against whom the estoppel is claimed actually obtained judgment as a result of the inconsistent position" asserted in the earlier action (903 F.2d at 114) (emphasis added).

The majority of federal courts that have considered the issue have held that success in the prior proceedings is a prerequisite to assertion of the defense of judicial estoppel. See, Konstantinidis v. Chen, 626 F.2d 933, 939 (D.C. Cir. 1980) (applying District of Columbia

1980) (applying District of Columbia law); United States v. 49.01 Acres of Land, 802 F.2d 387, 390 (10th Cir. 1986) (rejecting doctrine, but declaring that success in prior action has been recognized by most courts as essential element); Diginet, Inc. v. Western Union ATS, Inc., 958 F.2d 1388, 1397 (7th Cir. 1992); Matter of Cassidy, 892 F.2d 637, 641 (7th Cir.) (court must have concurred in earlier position), cert. denied, ____ U.S. ____, 111 St. Ct. 48 (1991); Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598, 599 (7th Cir. 1982); Tuveson v. Florida Governor's Council on Indian Affairs, Inc., 734 F.2d 730, 735 (11th Cir. 1984); City of Kingsport v. Steel and Roof Structure, Inc., 500 F.2d 617, 620 (6th Cir. 1974); In Re United Mine Workers of Amer.

Employee Benefit Plans Litigation v. Pittston Co., 782 F.Supp. 658, 673 (D.D.C. 1992) (expressing District of Columbia Circuit's wariness of doctrine); Alexander and Alexander, Inc. v. Wachovia Bk. & Trust Co., N.A., 754 F.Supp. 133, 136 (N.D. Ill. 1991); USLife Corp. v. U.S. Life Ins. Co., 560 F.Supp. 1302, 1304-05 (N.D. Tex. 1983) (noting more widely accepted approach is to require success in prior proceeding); Continental Cas. Co. v. Armstrong World Industries, Inc., 776 F.Supp. 1296, 1299 (N.D. Ill. 1991); Ellis v. Arkansas Louisiana Gas Co., 609 F.2d 436, 440 (10th Cir. 1979) (applying Oklahoma law), cert. denied, 445 U.S. 964 (1980); Universal City Studios, Inc. v. Nintendo Co., 578 F.Supp. 911, 921 (S.D.N.Y. 1983), affd, 746 F.2d 112 (2d Cir. 1984);

Long Is. Lighting Co. v. Transamerica Delaval, Inc., 646 F.Supp. 1442, 1447 (S.D.N.Y. 1986); Gibson v. Missouri Pac. RR Co., 314 F.Supp. 1211, 1216 (E.D. Tex. 1970), rev'd on other grds. 441 F.2d 784 (5th Cir.), cert. denied, 404 U.S. 855 (1971); Carey v. Electric Mut. Liab. Ins. Co., 500 F. Supp. 1227, 1229-30 (W.D.Pa. 1980) (applying Pennsylvania law requiring position to be actually considered and adopted in judicial proceeding); Scott v. Land Span Motor,Inc., supra, 781 F.Supp. at 1119, 1120; cf., Young v. United States Dept. of Justice, 882 F.2d 633, 639-40 (2d Cir. 1989) (contrasting case before it to "situation in which a party has obtained favorable relief with an implicit but misleading representation to a court that he would not subsequently

switch positions"), cert. denied, 493 U.S. 1072 (1990); Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 (4th Cir. 1982).

Several courts have held that where the prior judicial proceeding did not result in the judicial body being led astray by the claim or defense there asserted, but resulted in a settlement or a stipulation between the parties, judicial estoppel is not available. Said the court in Konstantinidis v. Chen, supra, 626 F.2d at 939:

> A settlement neither requires nor implies any judicial endorsement of either party's claims or theories and thus a settlement does not provide the prior success necessary for judicial estoppel. [Citations omitted].

In Merrill Lynch, Pierce, Fenner & Smith v. Georgiadis, supra, 903 F.2d at 114, the court, in noting the

absence of a successful result in the prior proceeding, referred to the fact that the prior proceeding "was dismised voluntarily in accordance with a stipulation." See also, Water Technologies Corp. v. Calco, Ltd., 850 F.2d 660, 666 (Fed. Cir.), cert. denied, 488 U.S. 968 (1988); City of Kingsport v. Steel and Roof Structure, Inc., supra, 500 F.2d at 620; Edwards v. Aetna Life Ins. Co., supra, 690 F.2d at 599 (where prior proceeding settled, "position cannot be viewed as having been successfully asserted"); Alexander and Alexander, Inc. supra, 754 F.Supp. at 136; Universal City Studies v. Nintendo Co., supra, 781 F.Supp. at 1120; cf., Gibson v. Missouri Pac. RR Co., supra, 314 F.Supp. at 1216; Wang Laboratories, Inc. v. Applied Computer Sciences,

Inc., 958 F.2d 355, 359 (Fed. Cir. 1992).

In Edwards v. Aetna Life Insurance Co., supra, 690 F.2d at 599, the court wrote:

> If the initial proceeding results in settlement, the position cannot be viewed as having been successfully asserted. ...The requirement that the position be successfully asserted means that the party must have been successful in getting the first court to accept the position. Absent judicial acceptance of the inconsistent position, application of the rule is unwarranted because no risk of inconsistent results exists. Thus, the integrity of the judicial process is unaffected; the perception that either the first or the second court was misled is not present. [Citations and fn. omitted].

Applying the above principles to the facts in the case at bar, it is clear that the Court of Appeals correctly found that respondent Malachy Lyons is not judicially estopped from maintaining the present

action for reinstatement and back pay.

The previous action was not successfully concluded in plaintiff's favor in any sense of the word, inasmuch as no jury rendered a final verdict in his favor, no judgment was entered in his favor, and no court placed its endorsement, or relied, on any claim plaintiff made. The FELA action was settled by the parties on September 24, 1985 after a liability verdict had been rendered but before completion of the damages phase of the trial.

The case was settled among the parties, including the defendant railroad and two other defendants, for a total of $98,000, out of which the railroad was to pay only $47,000, and out of that latter amount,

plaintiff was to repay a railroad retirement lien estimated to be between $15,000 and $17,000 (A1486, 1489). In addition, the stipulation of settlement included Mr. Lyons' wife's pending state court action for loss of services and "any accident or claim that may have arisen out of an incident which occurred on October 15, 1985" (A1491), in which Mr. Lyons re-injured himself upon returning to work 13 months after the September 9, 1983 automobile accident in which he was first injured.

The settlement did not provide that any part of the sum was being allocated either to pain and suffering, whether past or future, or to lost earnings, whether past or future. During the two years Mr. Lyons had been out of work prior to the

settlement -- September 1983 through September 1985 -- he lost a total of approximately $114,000 in past earnings, alone (A1026, and see A970-71), far more than the total settlement amount and more than twice as much as defendant contributed to the settlement. Moreover, the settlement clearly did not include compensation for loss of future earnings.

Under these circumstances, it cannot fairly be said that Mr. Lyons was successful in the FELA action such that he should be judicially estopped from bringing the present one.

In Merrill Lynch, Pierce, Fenner & Smith v. Georgiadis, supra, 903 F.2d at 114, the court stated the majority view of the doctrine in no uncertain terms: "judicial

estoppel...applies only if the party against whom the estoppel is claimed actually obtained a judgment as a result of the inconsistent position" (emphasis added). Moreover, the court declared that it does not apply where the prior action "was dismissed voluntarily in accordance with a stipulation" (id.).

Therefore, in order for judicial estoppel to apply, the court in the prior action must have actually adopted the alleged inconsistent position. Without such judicial endorsement, there has been no misleading of the court and no reliance by the court on the inconsistent position. In the present case there was no reliance by petitioner on Mr. Lyons' position in the FELA action, and there also was none by the trial

court.

What the court wrote in USLife Corp. v. U.S. Life Insurance Co., supra, 560 F.Supp. at 1306, directly applies here:

> [T]his Court is of the opinion that a requirement of prior success is well-founded and that it is the better approach. To estop a party from urging a position is an extreme measure which should only be taken where the equities are clearly in its favor. The equities in support of judicial estoppel are substantially increased where the possibility of inconsistent results exists. Accordingly, this Court concludes that prior success should be a requisite for its application [emphasis added].

The cases cited by petitioner at page 49 of its petition, as representing the so-called "true" majority rule are unavailing. In Kale v. Obuchowski, 985 F.2d 360 (7th Cir. 1993), it was clear that the plaintiff had "prevailed" in the earlier action by having

induced the state court to approve a property settlement in a divorce proceeding. In Wang Laboratories, Inc. v. Applied Computer Sciences, Inc., 958 F.2d 355 (Fed. Cir. 1992), it was said that the party subject to judicial estoppel must first have "obtained a litigation benefit" (id., at 358), which the prior settlement between the parties did not constitute (id., at 359). To the same effect is United States v. Levasseur, 846 F.2d 786, 794-95 (1st Cir. 1988). In Allen v. Zurich Insurance Co., 667 F.2d 1162, 1167 (4th Cir. 1982), the court referred to the successful assertion of a legal position in an earlier proceeding and then stated that the doctrine should be "applied with caution" (id.).

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be denied.

Dated: New York, New York
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